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ONLY

August 5, 2021

Re: *United States v. Michelle Morton*, S3 16 Cr. 371 (RA)

Dear Judge Abrams:

We write to provide an update on Ms. Morton's health and vaccination efforts, pursuant to the Court's May 4, 2021 order (Dkt. No. 970). Additionally, we write to respectfully request that the Court adjourn Ms. Morton's surrender date, which is currently scheduled for August 18, 2021, for a period of six months, until February 18, 2022.

As detailed below, the COVID-19 pandemic and the Delta variant continue to pose an unreasonable risk to Ms. Morton's health. [REDACTED]

[REDACTED] We ask that the Court further adjourn Ms. Morton's surrender in the interests of her health and safety.

BACKGROUND

I. Procedural History

On April 26, 2021, Ms. Morton requested a six-month adjournment of her surrender date in light of the fact that [REDACTED]. Dkt. No. 969. On May 4, 2021, the Court adjourned Ms. Morton's surrender date, then scheduled for May 18, 2021, to August 18, 2021, and ordered her to provide monthly updates on her health and vaccination efforts. Dkt. No. 970, at 11. Ms. Morton provided updates to the Court on June 4, 2021 and July 6, 2021. Dkt. Nos. 971, 975.

II. Relevant Facts

A. The Emergence of the Delta Variant in the U.S. Has Revived Concerns of Significant COVID-19 Outbreaks and Hospitalizations

As a threshold matter, the COVID-19 Delta variant¹ is increasing its dominance in the U.S., now accounting for more than 80% of new cases.² According to a recent study, the variant produces 1,000 times more viral load per infected patient than the Alpha variant, allowing it to spread more quickly during pre-symptomatic stages of infection and among fully vaccinated individuals.³ Worse, the Delta variant appears to double the risk of hospitalization as compared to the Alpha variant,⁴ and as the “fastest and fittest” version of the virus so far,⁵ experts have opined that the “Delta [variant] will certainly accelerate the pandemic.”⁶

The Centers for Disease Control and Prevention (“CDC”) have described the variant as “one of the most infectious respiratory viruses we know of,”⁷ and a July 30, 2021 report from the CDC (“CDC July Report”) confirmed its high transmissibility.⁸ The CDC July Report determined

¹ In addition to the Delta variant, there has been a growing focus on the Lambda variant. Although currently defined as a “variant of interest” by the World Health Organization (“WHO”), a recent study published by a team of Japanese researchers has indicated that mutations in Lambda’s proteins may “confer resistance to antiviral immunity” and render the variant “highly infectious” and “more susceptible to an infection-enhancing antibody.” Izumi Kimura et al., *SARS-CoV-2 Lambda variant exhibits higher infectivity and immune resistance*, *BiorXiv* (July 28, 2021), <https://www.biorxiv.org/content/10.1101/2021.07.28.454085v1>; see also *Tracking SARS-CoV-2 variants*, *WORLD HEALTH ORGANIZATION*, <https://www.who.int/en/activities/tracking-SARS-CoV-2-variants/> (last visited Aug. 1, 2021). These traits, the study believes, are “closely associated the massive infection spread of the Lambda variant in South America.” Kimura, *supra* note 1. Although first identified in Peru in December 2020, Lambda has since become prevalent in other parts of South America, and in mid-July, a hospital in Houston reported the United States’ first recorded case of the Lambda variant. See *id.*

² *5 Things To Know About the Delta Variant*, *YALE MEDICINE* (July 28, 2021), <https://www.yalemedicine.org/news/5-things-to-know-delta-variant-covid>.

³ Jing Lu et al., *Viral infection and transmission in a large well-traced outbreak caused by the Delta SARS-CoV-2 variant*, *VIROLOGICAL.ORG* (July 12, 2021), <https://virological.org/t/viral-infection-and-transmission-in-a-large-well-traced-outbreak-caused-by-the-delta-sars-cov-2-variant/724>.

⁴ *SARS-CoV-2 variants of concern and variants under investigation in England*, *PUBLIC ENGLAND HEALTH*, 46 (2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/991343/Variants_of_Concern_VOC_Technical_Briefing_14.pdf.

⁵ *COVID-19 Virtual Press conference transcript - 21 June 2021*, *WORLD HEALTH ORGANIZATION* (June 21, 2021), <https://www.who.int/publications/m/item/covid-19-virtual-press-conference-transcript---21-june-2021>.

⁶ *Supra* note 2.

⁷ *Delta variant is one of the most infectious respiratory diseases known, CDC director says*, *CNBC* (July 22, 2021), <https://www.cnn.com/2021/07/22/delta-variant-is-one-of-the-most-infectious-respiratory-diseases-known-cdc-director-says-.html>.

⁸ *Outbreak of SARS-CoV-2 Infections, Including COVID-19 Vaccine Breakthrough Infections, Associated with Large Public Gatherings — Barnstable County, Massachusetts, July 2021*, (“CDC July Report”) *CENTERS FOR DISEASE CONTROL AND PREVENTION* (July 30, 2021), https://www.cdc.gov/mmwr/volumes/70/wr/mm7031e2.htm?s_cid=mm

that, from a sample set of 469 positive cases, approximately 74% of those infected with COVID-19 were fully vaccinated.⁹ Genome sequencing was performed on a subset of 133 individuals and concluded that approximately 89% carried the Delta variant. Critically, 79% of the fully vaccinated individuals were symptomatic. The CDC July Report noted that, “[f]indings from this investigation suggest that even jurisdictions without substantial or high COVID-19 transmission might consider expanding prevention strategies, including masking in indoor public settings regardless of vaccination status, given the potential risk of infection during attendance at large public gatherings that include travelers from many areas with differing levels of transmission.”¹⁰ It further indicated that “[a]s population-level vaccination coverage increases, vaccinated persons are likely to represent a larger proportion of COVID-19 cases,” and that further study was underway to better understand how the CDC’s findings would apply to individuals with “underlying health conditions including immunocompromising conditions.”¹¹

Although released subsequently, the CDC July Report prompted the agency to revise its guidance on July 27, 2021, recommending stricter protections, even for healthy and fully vaccinated individuals. In its operative guidance, the CDC recommends that fully vaccinated individuals wear a mask “in public indoor settings if they are in an area of substantial or high transmission” or “if they or someone in their household is immunocompromised” “regardless of the level of transmission” in the area.¹² This guidance is consistent with recent statements from the WHO. During a July 7, 2021 press conference, WHO doctor, Dr. Michael Ryan, acknowledged that all regions of the globe were experiencing increased rates of infection, and that “[m]aking assumptions that transmission will not increase because we’re opening up because of [access to the] vaccine is a false assumption.” He continued, urging extreme caution, that “[t]ransmission will increase when you open up because, number one, we don’t have vaccines in everybody, and number two, the vaccine coverage rates are lower, and we’re not still sure to what extent vaccination protects against the ability to be infected or have onward transmissibility. This means

7031e2_w. Effective July 31, 2021, for example, Los Angeles County instituted a face mask requirement for “people aged 2 years and older, regardless of vaccination status, to wear a face mask in all indoor public settings, including all public and private businesses.” *Order of the Health Officer*, COUNTY OF LOS ANGELES DEPARTMENT OF PUBLIC HEALTH (July 30, 2021), http://publichealth.lacounty.gov/media/Coronavirus/docs/HOO/HOO_SaferReturnWorkCommunity.pdf. A similar requirement was put in place in the City of New Orleans, also effective July 31, 2021. *City of New Orleans Health Department Guidelines for COVID-19 Reopening*, CITY OF NEW ORLEANS (July 31, 2021), <https://ready.nola.gov/NOLAReady/media/Documents/Coronavirus/NOHD-Guidelines-for-reopening-July-31-2021-mask-mandate-FINAL.pdf>.

⁹ CDC July Report, *supra* note 8.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Interim Public Health Recommendations for Fully Vaccinated People*, CENTERS FOR DISEASE CONTROL AND PREVENTION (July 27, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html>.

that with increased transmission in the community we then put our most vulnerable at risk again .
...¹³

[REDACTED]

[REDACTED]

B.

[REDACTED]

[REDACTED]

¹³ *COVID-19 Virtual Press conference transcript - 7 July 2021*, WORLD HEALTH ORGANIZATION (July 7, 2021), <https://www.who.int/publications/m/item/covid-19-virtual-press-conference-transcript---7-july-2021>.

[REDACTED]

[REDACTED]

¹⁶ *Id.* at 30.

¹⁷ *Id.* at 32.

¹⁸ *Id.* at 26, 34.

¹⁹ *Id.* at 35.

[REDACTED]

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[REDACTED]

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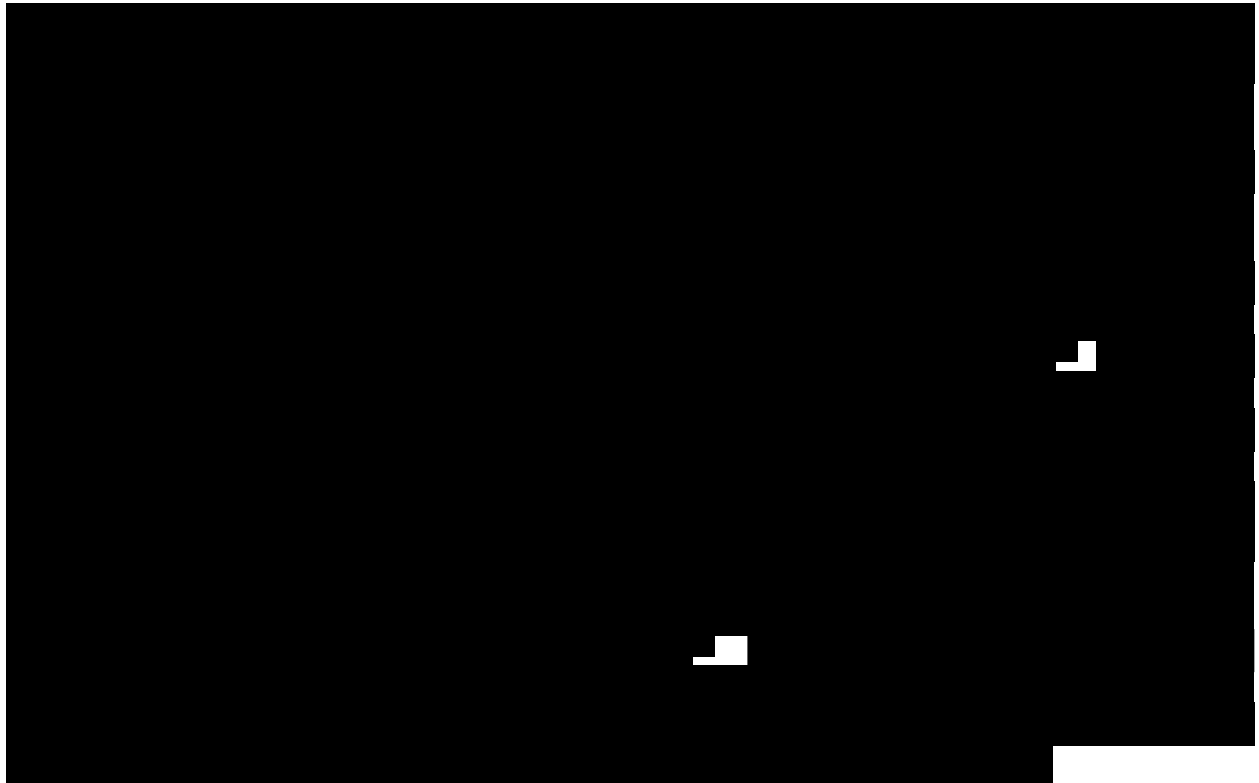
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



ARGUMENT

I. The Pandemic Is Still Uncontrolled and Vaccination Does Not Mitigate the Danger Imprisonment Poses to Ms. Morton's Life

The Delta variant poses a renewed risk for Ms. Morton due to its increased transmissibility and severity, even among vaccinated individuals. This is particularly concerning among a prison population, where individuals may be less likely to be vaccinated and it is more difficult, and at times impossible, to appropriately social distance. In addition, any reduction in the vaccines' effectiveness against the Delta variant is troubling as a general matter.

Ms. Morton's protection against COVID-19 infection depends in large part on the vaccination of others, or herd immunity, particularly given the potential diminished efficacy of her



own vaccination, *see supra*.²⁹ In June 2021, the Prison Policy Initiative reported that of the 45 prisons from which it collected data, only 60% of people inside state and federal prisons had received at least one dose of a vaccine.³⁰ Importantly, at FCI Danbury, the facility at which Ms. Morton has been designated to serve her custodial sentence, only approximately 64% of the inmates are fully inoculated.³¹ What is more, just barely 50% of correctional staff of the Federal Bureau of Prisons report being vaccinated.³² Unfortunately, vaccine hesitancy and accessibility to the vaccines within prisons, as well as the emergence of new variants reduces the likelihood of achieving herd immunity against the COVID-19 virus.³³

Further, vaccination does not mitigate the danger imprisonment poses to Ms. Morton's life. Based on current data around vaccination rates in prisons, researchers believe that incarcerated people will be even more susceptible to the Delta variant, due largely to overcrowding, lack of resources, and little access to medical care.³⁴

²⁹ *Key Things to Know about COVID-19 Vaccines*, CENTERS FOR DISEASE CONTROL AND PREVENTION (May 10, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html>; Mary Clare Fischer, *If I'm Immunocompromised, Should I Keep Wearing My Mask Once I'm Vaccinated?*, MICHIGAN HEALTH (May 28, 2021), <https://healthblog.uofmhealth.org/wellness-prevention/if-im-immunocompromised-should-i-keep-wearing-my-mask-once-im-vaccinated#activities>.

Dr. Anthony Fauci, has estimated that between 70% and 85% of the population needs to be vaccinated or otherwise immune in order to achieve herd immunity. *US likely needs to include vaccinating children to reach herd immunity, Fauci says*, CNN HEALTH (March 19, 2021), <https://www.cnn.com/2021/03/18/health/us-coronavirus-thursday/index.html>.

³⁰ Erika Tyagi & Poornima Rajeshwar, *Counting the Shots: The State of COVID-19 Vaccinations Behind Bars*, UCLA LAW COVID (June 25, 2021), <https://uclacovidbehindbars.org/blog/counting-the-shots-the-state-of-covid-19-vaccinations-behind-bars>.

³¹ *See COVID-19 Vaccine Implementation*, FEDERAL BUREAU OF PRISONS, <https://www.bop.gov/coronavirus/> (last visited Aug. 4, 2021) (listing 594 inmates as fully vaccinated); *FCI Danbury*, FEDERAL BUREAU OF PRISONS, <https://www.bop.gov/locations/institutions/dan/> (last visited Aug. 4, 2021) (listing a total population of 929 inmates); *see also Nearly 40% of Danbury FCI Inmates Refusing COVID-19 Vaccine*, NBC CONNECTICUT (Apr. 23, 2021), <https://www.nbcconnecticut.com/news/coronavirus/nearly-40-of-danbury-fci-inmates-refusing-covid-19-vaccine/2473628/> ("Just under 40% of the inmates inside the federal prison complex in Danbury have refused to take the COVID-19 vaccine, according to federal officials. The Connecticut U.S. Attorney's Office disclosed the latest vaccination numbers in a court filing Friday as part of class-action lawsuit over an alleged failure to protect prisoners from the coronavirus inside the institution.").

³² Tyagi & Rajeshwar, *supra* note 30.

³³ *See* Christie Aschwanden, *Five Reasons Why COVID Herd Immunity is Probably Impossible*, NATURE (March 18, 2021), <https://www.nature.com/articles/d41586-021-00728-2>.

³⁴ Kayla Hui, *The State of COVID-19 in U.S. Prisons*, VERYWELL HEALTH (July 9, 2021), <https://www.verywellhealth.com/prisons-covid-delta-variant-5191964>.

According to a researcher at the UCLA Law COVID Behind Bars Data Project, there have been few efforts to curb the Delta variant and COVID-19 across U.S. prisons. Further, there has been "evidence emerging that the counts [of fatalities in prisons] that have been recorded are actually undercounted." *Id.*

[REDACTED]

Importantly, the administration has not issued any formal guidance on or approval of a third dose, so this option is not available to Ms. Morton as of now.

Even if the vaccine has provided Ms. Morton with a measurable immune response, its efficacy is believed to wane over time. New research suggests that as months pass, the Pfizer vaccine, [REDACTED], may only be 39% effective at preventing infection from the Delta variant.³⁷

[REDACTED]

³⁷ Berkeley Lovelace Jr., *Israel says Pfizer Covid Vaccine is Just 39% Effective as Delta Spreads, but Still Prevents Severe Illness*, CNBC (Jul. 23, 2021), <https://www.cnbc.com/2021/07/23/delta-variant-pfizer-covid-vaccine-39percent-effective-in-israel-prevents-severe-illness.html>.

[REDACTED]

[REDACTED]

For all of these reasons, without an adjournment, Ms. Morton would be placed in a situation of disproportionate risk. At this point, we do not have the full picture as to the efficacy of vaccines on the Delta variant; nor do we know how wide-ranging the spread of the Delta variant may become across the United States and its prison system. [REDACTED]

[REDACTED] There is no need to force her into a potentially life-threatening situation. The Court acknowledged this at Ms. Morton's sentencing proceeding by saying, "I'm not going to put off a surrender date forever, but I do want to ensure that you're safe." (Nov. 18, 2020 Sentencing Tr. at 44:24-45:1.) At this point, there is no assurance that Ms. Morton would be safe were she to surrender as currently scheduled on August 18.

II. [REDACTED] Also Warrant an Adjournment of the Surrender Date

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

In addition, courts in this District have continued to delay surrender to address defendants' health concerns. For example, in *United States v. Shannon*, Judge Sullivan delayed the defendant's surrender date for a tenth time in order to permit him to receive treatment for "new serious medical complications that prevent[ed] [the defendant's] travel to his designated facility." 2021 U.S. Dist. LEXIS 79455 (S.D.N.Y. April 23, 2021). The defendant had recently been recently admitted to the hospital with left-side weakness, headache, and confusion, after previously suffering a stroke. *See id.*, Letter Motion, 18 Cr. 809 (RJS), Dkt. No. 75 (April 21, 2021). It is similarly essential that Ms. Morton's doctors be permitted to continue her evaluation so that she can establish appropriate treatment before her surrender.

There is no penological reason why Ms. Morton's sentence should not be further adjourned. She is fully prepared serve her sentence when it is safe to do so – but given the worsening state of the pandemic as well as [REDACTED], that time has not yet arrived.

* * *

Given the above, we respectfully request that the Court grant Ms. Morton's request for a six-month adjournment of her surrender date.

Respectfully submitted,

/s/ Nola B. Heller

Nola B. Heller
Julia C. Koch


The Honorable Ronnie Abrams
United States District Judge
Southern District of New York
40 Foley Square, Room 240
New York, New York 10007

BY EMAIL

cc: AUSA Rebecca Mermelstein
AUSA Negar Tekeci

In spite of the Court's reluctance to further adjourn Ms. Morton's voluntary surrender date, it will do so in light of the continued concerns presented by the COVID-19 pandemic and the heightened risk Ms. Morton faces due to her health issues. Ms. Morton's voluntary surrender date is therefore adjourned to January 10, 2022.

SO ORDERED.



Ronnie Abrams, U.S.D.J.
August 12, 2021

EXHIBIT 1

Document Filed Under Seal Pursuant to the Court's
Individual Rules, Rule 10(E)(i)

EXHIBIT 2

Document Filed Under Seal Pursuant to the Court's
Individual Rules, Rule 10(E)(i)

EXHIBIT 3

Document Filed Under Seal Pursuant to the Court's
Individual Rules, Rule 10(E)(i)

EXHIBIT 4

Document Filed Under Seal Pursuant to the Court's
Individual Rules, Rule 10(E)(i)

EXHIBIT 5

Document Filed Under Seal Pursuant to the Court's
Individual Rules, Rule 10(E)(i)